CANADIAN HUMAN RIGHTS TRIBUNAL TRIBUNAL CANADIEN DES DROITS DE LA PERSONNE

COMMUNICATIONS, ENERGY AND PAPERWORKERS

UNION OF CANADA AND FEMMES-ACTION

Complainants

- and -

CANADIAN HUMAN RIGHTS COMMISSION

Commission

- and -

BELL CANADA

Respondent

RULING ON DR. SHILLINGTON'S DOCUMENTS PREPARED IN CANADA POST AND GNWT

PANEL: J. Grant Sinclair 2005 CHRT 4
Pierre Deschamps 2005/01/27

INTRODUCTION

[1] The Complainant, CEP, proposes to call Dr. Richard Shillington and qualify him as an expert in applied statistics to give evidence in this hearing. The Respondent, Bell Canada, seeks production of certain reports prepared by Dr. Shillington for the Canadian Human Rights Commission, which are listed, on pp. 14 and 15 of his Curriculum Vitae, filed as exhibit CEP-34. Bell says that it wants to use these documents for the purpose of its cross-examination of Dr. Shillington on his qualifications as an expert.

[2] On consent of the parties, the Tribunal was given copies of these reports to review on a confidential basis. For the purpose of this ruling, they are referred to as GNWT, CPC-1 and CPC-2.

GNWT

[3] This consists of three reports, two dated March 28, 2001 and one dated March 19, 2001. The Commission claims settlement privilege with respect to GNWT. It argues that settlement privilege attaches because the reports were prepared for Ian Fine, Commission counsel, for the purpose of and during the course of settlement negotiations in *Public Service Alliance of Canada v. Government of the Northwest Territories.* In his affidavit filed on this motion, Mr. Fine states that the Commission relied on these reports in developing its position during the settlement negotiations. He also states that these confidential reports have never been disclosed or used by the Commission other than in the course of settlement discussions.

NO PRIVILEGE FOR THE COMMISSION

[4] The Commission asserts litigation privilege for CPC-1 and CPC-2. CPC-1 contains five reports prepared in 1996-97 by Dr. Shillington. CPC-2 is a six page report prepared by Dr. Shillington dated May 28, 1999. He testified that they were both provided at the request of Fiona Keith, Commission counsel in *Canada Post*.

[5] Bell's first argument is that the Commission has no claim in law to litigation or settlement privilege. For this argument, Bell relies on the Tribunal's decision in *Dhanjal v. Air Canada* (1996), 28 C.H.R.R. (CHRT), D/367, D/422-3.

[6] *Dhanjal* does not involve any issue relating to privilege. In the Addendum to its decision, the Tribunal commented on the conduct of Commission counsel, which the Tribunal characterized as excessively adversarial. It was the Tribunal's view that the role of Commission counsel is akin to the role of Crown counsel in a criminal proceeding as described by Sopinka J. in *R v. Stinchcombe*, [1991] 3 S.C.R. 326. This role is that of the Minister of Justice representing the public interest. (p. 341)

[7] *Stinchcombe* established that there is a general obligation on the Crown to disclose to the defense the fruits of its investigation. The rationale being that such information is in the public domain and is not to be used for the sole purpose of obtaining a conviction, but to ensure that justice is done. (p. 333)

[8] Under s. 51 of the *CHRA*, Commission counsel has the role of representing the public interest. By analogy, Bell argues that the Commission has the same obligation as the Crown, namely, to disclose all relevant information. Ergo, it cannot assert any privilege.

[9] In our view, Bell's reliance on *Stinchcombe* involves a misapplication of the *Stinchcombe* facts to this case and an incomplete reading of *Stinchcombe*. *Stinchcombe* deals with a criminal proceeding, striking a balance between the Crown and the defense as mandated by s. 7 of the *Canadian Charter of Rights and Freedoms* and what flows from that.

[10] Another distinction between a criminal proceeding and a Tribunal proceeding is found in the reasons of Sopinka J. where he points out that there is no duty on the defense to disclose anything to the prosecution. (p. 333) Bell has never taken the position that, as respondent in the hearing before this Tribunal, it has no obligation of disclosure.

[11] More to the point, there is nothing in *Stinchcombe* that says that a claim of privilege is never available to the Crown. The reasons of Sopinka J. are to the contrary. He makes it very clear that the Crown has a general duty to disclose unless non-disclosure can be justified on the basis of the law of privilege. (p. 340)

NO LITIGATION PRIVILEGE FOR CPC-1 OR CPC-2

[12] Bell next argues that even if privilege is available, the Commission has waived litigation privilege for CPC-1 and CPC-2. Bell relies on these facts. Public Service Alliance Commission's counsel in *Canada Post* asked Dr. Shillington to prepare an analysis for him. According to the *Canada Post* transcripts provided to this Tribunal, Dr. Shillington was a person who PSAC had been consulting with. He was helping PSAC with their understanding of the report and with the cross-examination of Dr. Killingsworth, an expert statistician who was called by Canada Post.

[13] To do the analysis, Dr. Shillington needed certain data, which he asked for and received from Dr. Killingsworth. He then prepared the analysis which consisted, according to the transcripts, of five graphs and an Excel spreadsheet. In this ruling we referred to these five graphs and Excel spreadsheet as the June 1999 work.

[14] In the course of his cross-examination, PSAC counsel asked Dr. Killingsworth if he agreed that the graphs and the spreadsheet were accurate and looked reasonable to him. Dr. Killingsworth replied that he was not in a position to answer this question, so PSAC counsel asked him to try and replicate Dr. Shillington's analysis. Dr. Killingsworth

testified that he was able to produce very similar but not identical graphs, using, he said, the same data that he had provided to Dr. Shillington.

[15] The graphs and spreadsheet prepared by Dr. Shillington were not entered into evidence. Canada Post counsel objected to them being so entered. The graphs prepared by Dr. Killingsworth were entered as PSAC exhibits 161, 162, 163, 164, etc.

[16] Bell asserts that a claim of litigation privilege for Dr. Shillington's work for the Commission in *Canada Post* is unsupportable. In its submissions, Bell argues that it is a matter of public record that all or part of his work for the Commission was filed as PSAC exhibits 161, 162, and 163 by PSAC counsel when cross-examining Dr. Killingsworth. The Commission, says Bell, must therefore have revealed Dr. Shillington's work to another party, PSAC.

[17] Bell next argues that, when considering the question of privilege, all of Dr. Shillington's work done for the Commission in *Canada Post* relating to the generic issues of pay equity must be dealt with as a package. That is, there is a nexus between the June 1999 work and CPC-1 and CPC-2 that is established by reference to the subject matter, the preparer and the nature of the issues.

[18] Bell's concluding argument is that, having waived privilege over Dr. Shillington's June 1999 work, the Commission must also be taken to have waived privilege over all of his work done for the Commission in *Canada Post* relating to pay equity.

[19] We do not accept these arguments. First of all, the *Canada Post* transcripts show that Dr. Shillington's graphs and spreadsheet was not work done for the Commission, but was prepared at the request of PSAC counsel.

[20] Secondly, Bell has misstated the facts. It is not the case that all or part of Dr. Shillington's work for the Commission was filed as PSAC exhibits 161, 162, 163,etc. The facts are that none of his work has been so entered. PSAC exhibits 161, 162, 163, etc. were prepared by Dr. Killingsworth.

[21] Thirdly, it is clear that PSAC counsel did not intend nor did he make any claim to shield Dr. Shillington's work from scrutiny by the other side when he presented it to Dr. Killingsworth for the purpose of cross-examination.

[22] Finally, even assuming that Dr. Shillington's work for PSAC was prepared for the Commission and shared with PSAC counsel and was made public, we do not agree that there is a sufficient nexus between this work and CPC-1 and CPC-2. Bell, admittedly, has no authorities to support its argument that all of Dr. Shillington's work must be considered as a package. Bell's argument cannot rest on a mere assertion without more.

NO SETTLEMENT PRIVILEGE - GNWT

[23] As for GNWT, Bell challenges the Commission's assertion of settlement privilege. Bell says the settlement is a public document; it has been disseminated widely to the public and in particular, to current and former employees by way of an information campaign; and, there are documents attached to the settlement agreement that deal with technical and statistical issues, including methodology and foundation.

[24] The policy behind settlement privilege is that parties should be encouraged to resolve their disputes without a trial. It follows then that the public interest, in encouraging the settlement of disputes, requires that documents or communications created for the purpose of settlement negotiations be privileged. (See *Pirie v. Wyld*,[1886] O.J. 188; Sopinka et al, *Law of Evidence in Canada* 2nd ed. 1999, Para. 14. 201; 14. 213)

[25] It is also well established law that settlement privilege applies to communications made with the express or implied intention that they would not be disclosed and does not end if settlement negotiations fail or if settlement is concluded. And the privilege extends to subsequent proceedings unrelated to the previous dispute. (See Sopinka et al, Para 14.216 and 14.224; *Middelkamp v. Fraser Valley Real Estate Board,* [1992] B.C.J. No. 1947; 71 B.C.L.R. (2nd) 276 (B.C.C.A.))

[26] The evidence of Ian Fine is that Dr. Shillington's reports were prepared to assist during the settlement negotiations. It was never intended that they be made public nor were they used or disclosed other than for settlement purposes.

[27] Does the fact that the settlement reached by the parties is a matter of public record mean that all documents used in negotiations leading to the settlement lose their confidentiality? This is Bell's position and in support, Bell referred to two cases, *Hill v. Gordon-Daly Grenadier Securities,* (2001) 56 O.R. (3rd) 388; and *Gay v. UNUM Life Insurance Co. of America*, [2003] N.S.J. No. 442.

[28] In our opinion, neither case is helpful to Bell's argument. *Hill* involved a prosecution under the *Ontario Securities Act* for breach of trust. In furtherance of a settlement agreement between the Ontario Securities Commission and the defendants, the defendants made certain admissions in the settlement agreement. On the basis of these admissions, the OSC found that the defendants failed to deal fairly and honestly with certain of their clients.

[29] These clients brought a class action against the defendants and, to support this action, wished to rely on the admissions of the defendants contained in the settlement agreement. The defendants claimed privilege over all the settlement documents. The Ontario Divisional Court held that privilege did not apply in these circumstances.

[30] The Court reasoned that the OSC guidelines provided that any settlement agreement would be a matter of public record. The defendant entered into the settlement agreement fully knowing that whatever they admitted would be made public. They must be taken to have waived any claim to privacy or privilege.

[31] This case is clearly distinguishable from the GNWT facts. The settlement in *GNWT* was not pursuant to a statutory scheme. It cannot be concluded, as it was in *Hill*, that any expectation of privacy or privilege was lost when the settlement itself, not the negotiations leading into settlement, were made public.

[32] In *Gay*, the plaintiff commenced an action against the defendant UNUM Life Insurance Company claiming accident insurance benefits. This action was subsequent to an action that she had brought against certain doctors and a hospital for malpractice. The malpractice action was settled by mediation. The mediation contract had a confidentiality clause that all communications between the parties were privileged and without prejudice.

[33] For the mediation, the defendant doctors had disclosed to the plaintiff reports by their experts relating to the question of their professional liability. The defendant insurance company requested production of the expert reports. The Court ordered production reasoning that once the expert reports were disclosed to the plaintiff, the confidentiality was lost whether or not designated without prejudice.

[34] In our view, the facts in *GNWT* are so distinguishable from *Gay* as to make the conclusion in *Gay* untransferable.

[35] For the above reasons, Bell's motion is dismissed.

_____*"Signed by"*__________
J. Grant Sinclair, Chairperson

_____*"Signed by"*__________

Pierre Deschamps, Member

OTTAWA, Ontario
January 27, 2005

PARTIES OF RECORD

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